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No. 06-6407

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In The

Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Must Petitioner's habeas application be dismissed as "second or successive" pursuant to 28 U.S.C. § 2244?

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MR. PANETTI'S HABEAS PETITION RAISING AN EXECUTION COMPETENCY CLAIM IS NOT "SECOND OR SUCCESSIVE" UNDER 28 U.S.C. § 2244.

Counsel for Petitioner Scott Louis Panetti did not include a *Ford* claim in the initial federal habeas petition. In response to this Court's request for supplemental briefing, counsel anticipate the State will argue that the Court must dismiss the current petition raising a *Ford* claim, because it is "second or successive" under AEDPA and counsel did not seek authorization from the Court of Appeals to file it in the District Court. If counsel had sought appellate permission, the State will presumably contend, the Fifth Circuit would have been obliged to deny it, because the *Ford* claim does not meet either of the exceptions to new-claim successors found in 28 U.S.C. § 2244(b)(2). This argument fails for several reasons.

First, the present habeas petition contests the State's attempt to carry out Mr. Panetti's death sentence while he is incompetent. It does not contest the judgment convicting Mr. Panetti of murder and sentencing him to death. The validity of that judgment was the subject of Mr. Panetti's earlier petition. Therefore, this case, unlike *Burton v. Stewart*, 127 S.Ct. 793 (2007), does not involve a second habeas challenge to the same state court judgment. If Mr. Panetti prevails on his *Ford* claim now but later regains competency, the State can carry out its extant, undisturbed judgment by executing him.

Second, the *Ford* claim was not ripe at the time counsel filed Mr. Panetti's initial federal petition. The claim would not become ripe for another four years, after the federal courts rejected all of his challenges to his conviction and sentence, and when his execution was scheduled and imminent. Moreover, Texas law does not contemplate the filing of a *Ford* claim until that time. Therefore, counsel would have been unable to exhaust the claim until after the initial federal habeas proceedings had ended and the State sought an execution date. The phrase "second or successive" in Section 2244(b) is a term of art

that is inapplicable to a *Ford* petition filed in these circumstances, under the reasoning of *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). The only way the Court could distinguish *Martinez-Villareal* in Mr. Panetti's case would be to adopt a rule that would require every prudent attorney to include a *Ford* claim in a first federal petition in every capital case, only to have it dismissed as premature. Such a rule would be senseless and inefficient, benefitting no one.

Finally, again unlike the habeas petitioner in *Burton*, Mr. Panetti did not subvert any of the aims of AEDPA or this Court's federal habeas jurisprudence in bringing his *Ford* claim when he did. To the contrary, he could not have brought it earlier consistently with the federal habeas rules requiring exhaustion of state remedies and with Texas law demanding that competency determinations await the setting of an execution date. Nor could he have withheld the claims raised in his initial federal petition until the *Ford* claim in his present petition was ripe for judicial consideration. By the time his *Ford* claim matured, AEDPA's statute of limitations would have time-barred the challenges to his conviction and sentence.

A. Mr. Panetti's present habeas petition is not "contesting the same custody imposed by the same judgment of a state court" as his earlier petition.

In *Burton*, this Court recently held that a state prisoner seeking federal habeas relief had filed a "second or successive" petition that failed to comply with the gatekeeping requirements of 28 U.S.C. § 2244(b).[1] Burton filed his first federal habeas petition in 1998, challenging his conviction while state review of his sentence was still pending. 127 S.Ct. at 795. After the state courts rejected his sentencing claims, Burton filed another federal habeas petition in 2002, attacking only his sentence. *Id.* at 796.

[1] The text of 28 U.S.C. § 2244(b) is set out in Appendix A.

This Court found that "Burton twice brought claims contesting the same custody imposed by the same judgment of a state court." *Id.* Accordingly, AEDPA required that he first seek and receive authorization from the court of appeals before filing his second petition in the district court. *Id.* Because Burton did not receive permission from the court of appeals, the district court was without jurisdiction to entertain the second petition. *Id.*

Mr. Panetti's present petition is not "second or successive" within the meaning of Section 2244(b) as construed in *Burton*. His earlier habeas petition raised only the usual, trial-type challenges to his state court conviction and sentence. The *Ford* claim contained in his current petition does not attack the validity of that judgment but, instead, contends that the State may not carry out his sentence of death during a time when he is mentally incompetent. *See Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (holding that the Eighth Amendment prohibits the State from taking the life of an insane prisoner); *see id.* at 416-17 (plurality opinion) (describing the Eighth Amendment holding as a "constitutional restriction upon [the State's] execution of sentences"); *id.* at 425 (Powell, J., concurring) (recognizing that, because "the prisoner has been validly convicted of a capital crime and sentenced to death," the only issue "is not *whether*, but *when*, his execution may take place") (emphases in original); *id.* at 425 n.5 (noting that, "if petitioner is cured of his disease, the State is free to execute him"). Consequently, a petition raising only a *Ford* claim is not "second or successive" under 28 U.S.C. § 2244(b)(2) – a phrase that *Burton* recognizes as referring to two or more petitions "contesting the same custody imposed by the same judgment of a state court." *Burton*, 127 S.Ct. at 796. Rather, such a petition is squarely within the class of those that *Martinez-Villareal* held are *not* second or successive. *See* Part B, *infra*.

The distinction between a claim attacking a state court judgment and a claim contending only that the sentence imposed by the state court cannot be carried out under some limited set of supervening circumstances is not an artificial or unfamiliar one. It is the basis for this

Court's recent decisions in cases involving challenges to lethal injection procedures. In *Nelson v. Campbell*, 541 U.S. 637 (2004), the prisoner filed a civil rights action under 42 U.S.C. § 1983 to enjoin the State of Alabama from using an invasive surgical procedure to obtain venous access for a lethal injection. Both the district court and the court of appeals construed the lawsuit as a habeas action and dismissed it for failing to comply with AEDPA's requirements for filing a second or successive petition. *Id.* at 642. This Court held that Section 1983 was the appropriate vehicle, because a lawsuit "seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself – by simply altering its method of execution, the State can go forward with the sentence." *Id.* at 644. Similarly, in *Hill v. McDonough*, 126 S.Ct. 2096 (2006), the prisoner filed a Section 1983 action seeking an injunction to prevent the State of Florida from using a particular sequence of three drugs to execute him by lethal injection. The Court allowed the case to proceed in the district court without gatekeeper authorization by the court of appeals, holding that Hill's lawsuit could not be viewed as a second or successive habeas petition, because "if successful [it] would not necessarily prevent the State from executing him by lethal injection." *Id.* at 2102.

Nelson and *Hill* were civil rights actions under 42 U.S.C. § 1983, not habeas proceedings. However, this Court permitted those cases to proceed under Section 1983 precisely because it concluded that they did not implicate the procedural restrictions that AEDPA and the Court's own rules impose on federal habeas review, including the provisions barring successive petitions.[2] In reaching that conclusion, *Nelson* and *Hill* distinguished between claims

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[2] In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court prohibited state prisoners from using Section 1983 to raise challenges to custody that are cognizable in habeas. The purpose of the rule is to prevent state prisoners from resorting to Section 1983 to circumvent the various procedural restrictions applicable to federal habeas proceedings. *Id.* at 489-90.

that would wholly foreclose execution of a state court judgment and claims that would prevent the execution of the judgment under some set of circumstances but not others. Mr. Panetti's *Ford* claim is exactly like those of Hill and Nelson in that regard: It asserts that the State cannot execute him while he is incompetent, but that it may if he regains his competency. His *Ford* claim does not revisit the state court judgment that was the subject of his earlier federal habeas petition, but argues only that the execution of that judgment must await his return to sanity.

B. Under the reasoning of *Stewart v. Martinez-Villareal*, a numerically second petition that raises only a previously unripe *Ford* claim is not a "second or successive habeas corpus application" as that phrase is used in 28 U.S.C. § 2244(b)(2).

In *Martinez-Villareal*, this Court refused to treat a prisoner's numerically second petition raising a *Ford* claim as "second or successive" under Section 2244(b)(2). The Court recognized that the statutory phrase "second or successive" is a term of art in the habeas context, not a mere mathematical computation. 523 U.S. at 643-45.[3] It

[3] This conclusion is hardly surprising. The term "second or successive" in Section 2244(b) cannot be given a literal, mathematical meaning without producing patently absurd results. To see why this is so, it is sufficient to observe that the same language, "claim presented in a second or successive habeas corpus application," is used both to prohibit claims "presented in a prior application" (Subsection 2244(b)(1)) and to restrict claims "not presented in a prior application" (Subsection 2244(b)(2)). Consider the commonplace situation of an individual who is convicted of a crime in state court, successfully challenges that conviction in a federal habeas proceeding, is retried and reconvicted for the same crime, and then files a numerically "second" federal habeas application challenging this new conviction. Or consider the situation of an individual who is convicted in state court of a first criminal act, *X*, challenges that conviction in an unsuccessful federal habeas petition, serves his time, commits a second crime after being released, is convicted of this new crime, *Y*, and files a numerically "second" federal habeas application challenging the conviction for *Y*. Are such "second or successive habeas corpus application[s]" within the compass of

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further recognized that a petition raising a claim that was not previously ripe for adjudication is not "second or successive." The Court grounded its reasoning on the very nature of *Ford* claims: Intrinsically, they are unripe until execution is scheduled and imminent. *See id.* at 645 (recognizing that, because Martinez-Villareal's execution "was not imminent . . . his competency to be executed could not be determined at that time"); *id.* at 643 (noting that, only after habeas relief was denied by the court of appeals and the Arizona state courts issued an execution warrant was the *Ford* claim "unquestionably ripe"); *id.* at 645 (emphasizing that the *Ford* claim "has not been ripe for resolution until now"); *see also Herrera v. Collins*, 506 U.S. 390, 406 (1993) (recognizing that "the issue of sanity [for a *Ford* claim] is properly considered in proximity to the execution"); *Ford*, 477 U.S. at 429 (O'Connor, J., concurring in the result in part and dissenting in part) (noting that, "until the very moment of execution" the issue of a prisoner's competency to be executed "can *never* be conclusively and finally determined") (emphasis in original).[4]

Section 2244(b)? Whatever the answers to these questions, they cannot rationally be derived by simple one-plus-one mathematics. Nor can an abacus alone resolve such cases as those of a prisoner who first files an unsuccessful federal habeas petition challenging his state conviction for constitutional trial error and later files another federal habeas petition – challenging the constitutionality of a revocation of parole, *see, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471 (1972), or the arbitrary denial of a state-created right to "good time" credit, *see, e.g.*, *Lynce v. Mathis*, 519 U.S. 433 (1997) – on the sentence imposed upon the original state court conviction. To decide each of these cases, a court must do exactly what this Court did in *Martinez-Villareal*: It must construe the statutory language "second or successive habeas corpus application" in a way that makes sense and avoids "seemingly perverse" results. 523 U.S. at 644. It cannot simply incant, "There were two petitions by the same petitioner, so the numerically second one is always out of court."

[4] The point is conceptual as well as practical. Unlike most constitutional claims, a *Ford* claim is forward-looking (challenging the carrying out of an execution in the near future against an arguably incompetent inmate) rather than backward-looking (challenging the constitutionality of proceedings during the petitioner's earlier trial or appeal).

(Continued on following page)

Texas state law is consistent with *Martinez-Villareal*. It does not contemplate a prisoner's filing a *Ford* claim in state court until an execution date is set:

> The fact that appellant had a mental illness when he was tried and sentenced is not determinative of whether he will be sane at the moment of his execution. The proper time to argue the [*Ford*] issue is after appellant has been sentenced to death and his execution is imminent. . . . Thus, appellant's Federal Constitutional claim is not yet ripe and is not properly before this Court in the instant appeal.

Colburn v. State, 966 S.W.2d 511, 513 (Tex. Crim. App. 1998). Moreover, Texas law isolates execution competency claims in a proceeding separate from habeas. Article 11.071 establishes "the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death." Tex. Code Crim. Proc. art. 11.071 § 1. Article 46.05 deals solely with the procedures for raising and adjudicating *Ford* claims. *See* Petitioner's Merits Brief at App. A (setting out text of Article 46.05). Both *Colburn* and Article 46.05 instruct Texas death row inmates not to raise *Ford* claims until the state and federal courts have adjudicated and rejected all ordinary habeas claims and an execution date is set.

Counsel for Mr. Panetti filed the state habeas petition in 1997 and the initial federal habeas petition in 1999. On October 31, 2003, the state trial court scheduled Mr. Panetti's execution for February 5, 2004. Accordingly, Mr. Panetti's *Ford* claim did not become ripe until six years

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Consequently, it is the setting of an execution date that triggers the cause of action and makes a *Ford* claim ripe. For that reason – as well as the obvious impracticality of determining future competency long in advance of an execution – the claim ordinarily cannot be heard until state and federal courts have finally adjudicated all of the petitioner's backward-looking habeas claims. *See, e.g., Richardson v. Johnson*, 256 F.3d 257, 259 (5th Cir. 2001) (noting that "state courts, in part at our urging, now seldom set execution dates until after the first round of appeals and habeas").

after his state habeas petition was filed and four years after his federal habeas petition was filed. Soon after his *Ford* claim became ripe, counsel for Mr. Panetti filed an Article 46.05 motion and, when it was denied, the federal *Ford* claim. These were the right times for each filing – the times when Texas law and *Martinez-Villareal* contemplate that counsel will determine whether a *Ford* claim is warranted and, if so, file it. *Martinez-Villareal* recognizes that it would be a "seemingly perverse" reading of AEDPA to interpret Section 2244(b) as foreclosing *Ford* claims altogether by making them either always too early or always too late – unripe before they mature and successive after they mature. 523 U.S. at 644. That is no less true when a prisoner does not include an unripe *Ford* claim in his initial petition as when he does.[5] Linguistically and logically, it would make no sense to say that a *Ford* claim is more "second" in Mr. Panetti's case, where counsel raised it only once in federal court, than in *Martinez-Villareal*, where the petitioner raised it twice.

C. Requiring every condemned inmate to raise a *Ford* claim in his or her initial federal petition would encumber habeas practice with wasteful, burdensome, and purposeless pleadings, benefitting no one.

A ruling that distinguishes Mr. Panetti's case from *Martinez-Villareal* on the ground that his counsel did not raise the *Ford* claim in federal court until it was ripe

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[5] Counsel for Mr. Panetti recognize that *Martinez-Villareal* explicitly reserved the question whether the decision would apply in a case like Mr. Panetti's, where a *Ford* claim was not raised in the inmate's first federal habeas petition. 523 U.S. at 645 n.*. However, to draw a negative inference from that footnote reservation "mistakes the reservation of a question with its answer." *Clark v. Martinez*, 543 U.S. 371, 378 (2005). When the language of a statute that the Court is interpreting in two successive cases "provides for no distinction" between the circumstances presented in the two cases, the Court's construction of that language in the first case "results in the same answer" in the second, despite an explicit reservation of the question in the first opinion. *Id.* at 379.

would have deleterious effects on federal habeas practice. It would virtually guarantee that diligent counsel for the condemned would insert *Ford* claims in every initial federal habeas petition. These claims would necessarily be dismissed as unripe. Such a procedure would serve no purpose, benefit no one, and create needless, futile work for federal judges.

An informal review of reported cases of death row inmates who have been executed since this Court decided *Ford* reveals that the vast majority of inmates do not raise execution competency claims in federal court. The statistics indicate that *Ford* claims are raised in only about six percent of those cases.[6] Treating *Ford* petitions like Mr. Panetti's as "second or successive" would impose a *de facto* obligation on federal habeas counsel for the remaining 94 percent of death row inmates to insert a *Ford* claim in the inmate's first federal petition. At the time the initial petition is filed, counsel cannot be sure that, years later, his or her client will not succumb to mental illness, sustain a severe head injury, or suffer a physical trauma (like a massive stroke) resulting in incompetency. No attorney wants to be responsible for irrevocably forfeiting a potentially valid future claim in a death penalty case. Ordinary caution would lead every prudent attorney to include an "obligatory" *Ford* claim in any condemned inmate's first federal habeas petition – even though the claim cannot be adjudicated at that time and may never become factually supportable.

The progressive mental deterioration that many people with schizophrenia experience should also caution against a rule requiring a petitioner to raise a non-ripe *Ford* claim, even if some facts might suggest the petitioner's potential incompetency at that time. *See Scott v. Mitchell*, 250 F.3d 1011, 1013 (6th Cir. 2001) (concluding that the facts bearing on the petitioner's schizophrenia forming the basis

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[6] Between the date *Ford* was decided on June 26, 1986, and the end of 2006, 996 inmates were executed in the United States. Of those cases with reported decisions, only 61 inmates raised *Ford* claims in federal court.

of his *Ford* claim were not fully available at the time of the earlier petition, because "this mental disease is progressive and . . . its victims do not improve but only get worse").[7] Because the facts could change significantly before an execution date is scheduled and imminent, such a rule serves no purpose, especially when the federal courts cannot address the claim, for it is unexhausted and not yet ripe in state court. In short, no one – not the federal courts, the state courts, the State's lawyers, or habeas counsel – would benefit from such an inefficient and senseless practice. "[I]t is the height of perversity to require a prisoner to present a claim needlessly, at substantial cost to the prisoner and the courts, for the express purpose of seeking a ruling from the court that the claim is being presented at the wrong time." Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 778 (2002). This cannot possibly be what Congress intended AEDPA to accomplish.

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[7] Although a federal district judge should follow *Martinez-Villareal* and dismiss as unripe a *Ford* claim raised long before any possible execution date, a court may advertently or inadvertently reject the claim on the merits. Later, after an execution date is set and the claim becomes ripe, that same court may dismiss a numerically second petition containing it as a same-claim successor categorically barred by AEDPA. The courts pursued this course in *Delk v. Cockrell*, 2002 WL 32598585 (5th Cir. Feb. 28, 2002) (unpublished):

> Notwithstanding the district court's view that Delk's *Ford* claim is being raised for the first time, and in the light of the first proceedings in state and federal court, it appears it was previously raised and that, therefore, he seeks successive habeas relief. Accordingly, pursuant to 28 U.S.C. § 2244(b)(1), Delk is barred from doing so.

Id. at *4.

D. A procedure that permits a petitioner to raise a *Ford* claim only after it has become ripe and has been exhausted is consistent with AEDPA's purposes.

In *Burton*, this Court ordered the prisoner's second federal habeas petition to be dismissed as successive under Section 2244(b)(2). 127 S.Ct. at 799. The Court concluded that Burton should not be permitted to pursue a second federal petition raising claims that were unexhausted at the time he elected to proceed to adjudication on a first petition containing only exhausted claims. *Id.* at 797. Allowing the courts to review the merits of the second petition under these circumstances would violate the "total exhaustion" rule of *Rose v. Lundy*, 455 U.S. 509, 522 (1982), and increase the risk of piecemeal litigation. *Id.* (citing *Duncan v. Walker*, 533 U.S. 167, 180 (2001)). It would also undermine AEDPA, "with its goal of 'streamlining federal habeas proceedings.'" *Id.* (quoting *Rhines v. Weber*, 544 U.S. 269, 277 (2005)).

Unlike Burton, counsel for Mr. Panetti have not tried to circumvent the exhaustion requirement and litigate claims piecemeal. Permitting Mr. Panetti to bring his *Ford* claim in a numerically second petition – after the State seeks an execution date – affirmatively furthers "AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan*, 533 U.S. at 181. Texas state law and practice demanded that Mr. Panetti's counsel wait until the *Ford* claim became ripe with the setting of an execution date before exhausting it in state court. Counsel promptly brought the claim in federal court after the state court had adjudicated the claim.

Moreover, unlike Burton, counsel for Mr. Panetti could not have presented the *Ford* claim and Mr. Panetti's habeas claims relating to his conviction and sentence in a single federal petition without running afoul of the statute of limitations. *Burton* noted that the prisoner there would not have risked losing his opportunity to challenge his conviction in federal court if he had waited until after the

state courts completed their review of his sentencing claims. 127 S.Ct. at 798. Because final judgment in a criminal case means sentence, Burton's limitations period did not begin running "until both the conviction *and* sentence 'became final by the conclusion of direct review or the expiration of the time for seeking such review'" – which occurred well after he filed his first federal petition. *Id.* at 799 (quoting 28 U.S.C. § 2244(d)(1)(A)) (internal quotation marks omitted, emphasis in original).

Mr. Panetti, like most petitioners with *Ford* claims, did not have the option of waiting to file his initial federal habeas petition until his *Ford* claim became ripe. His one-year limitations period for the claims challenging his conviction and sentence began running on October 5, 1998, when this Court denied certiorari on direct review. *See Panetti v. Texas*, 525 U.S. 848 (1998).[8] He filed his initial federal petition less than a month before the limitations period expired. Four years later, his *Ford* claim became ripe. Had Mr. Panetti waited until then to file all of his claims in a single federal petition, all but his *Ford* claim would have been untimely.

[8] Mr. Panetti's state habeas proceedings had ended before the Court denied certiorari.

CONCLUSION

Mr. Panetti's current petition containing the *Ford* claim is not "second or successive" within the meaning of 28 U.S.C. § 2244(b)(2). Accordingly, he did not need to seek authorization from the Court of Appeals before filing it in the District Court.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

28 U.S.C. § 2244(b)

Finality of determination

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate of the claim could not have been discovered previously through the exercise of due diligence; and,

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.
